Supreme Court, U.S.
FILED
JUN 23 2002
CLERK

No. 01-866

IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.
D/B/A TIME WARNER CABLE,
Petitioner,

v.

NATIONAL SATELLITE SPORTS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

RICHARD W. CLARY
GARY A. BORNSTEIN
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

MARC APFELBAUM
JEFFREY M. ZIMMERMAN
CRAIG A. GOLDBERG
TIME WARNER CABLE
290 Harbor Drive
Stamford, CT 06902
(203) 328-0600

HENK BRANDS
Counsel of Record
COLIN S. STRETCH
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

PAUL T. CAPPUCCIO
EDWARD J. WEISS
AOL TIME WARNER INC.
75 Rockefeller Plaza
New York, NY 10019
(212) 484-8000

Counsel for Petitioner

January 23, 2002

15 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. REVIEW IS REQUIRED IN CONNECTION WITH THE COLLATERAL-ESTOPPEL ISSUE	1
II. REVIEW IS REQUIRED IN CONNECTION WITH THE SECTION 605 STANDING ISSUE	8
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Bank of Guam v. Wiseman, No. 87-1799, 1990 WL 140521 (9th Cir. Sept. 27, 1990) 5

Ezagui v. Dow Chem. Corp., 598 F.2d 727 (2d Cir. 1979) 7

Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987) . . . 6, 7

Glover v. United States, 531 U.S. 198 (2001) . . 1

Halpern v. Schwartz, 426 F.2d 102 (2d Cir. 1970) 7

Hicks v. Quaker Oats Co., 662 F.2d 1158 (5th Cir. Unit A Dec. 1981) 5

Irving Nat'l Bank v. Law, 10 F.2d 721 (2d Cir. 1926) 6, 7

Joe Hand Promotions v. D.M.B. Ventures, Inc., Nos. CIV. A. 93-2656 & 93-3141, 1995 WL 328399 (E.D. La. May 31, 1995) 8

Joe Hand Promotions, Inc. v. Rennard Street Enters., Inc.:

954 F. Supp. 1046 (E.D. Pa. 1997) 8

975 F. Supp. 746 (E.D. Pa. 1997) 8

Kalka v. Hawk, 215 F.3d 90 (D.C. Cir. 2000) _. 6

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) 1

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 4

Spinelli v. Gaughan, 12 F.3d 853 (9th Cir. 1993) 5

Staatsburg Water Co. v. Staatsburg Fire Dist., 527 N.E.2d 754 (N.Y. 1988) 4

TRW Inc. v. Andrews, 122 S. Ct. 441 (2001) . . 1

Television Signal Corp. v. Chapman, No. C92-3732, 1993 WL 69179 (N.D. Cal. Mar. 3, 1993) 8

That's Entertainment, Inc. v. J.P.T., Inc., 843 F. Supp. 995 (D. Md. 1993) 8

Westgate-California Corp., In re, 642 F.2d 1174 (9th Cir. 1981) 5

Williams v. Ward, 556 F.2d 1143 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977) 7

Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978) . 7

Yamaha Corp. of America v. United States, 961 F.2d 245 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1078 (1993) 5, 6

STATUTES

Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*:

47 U.S.C. § 605 . . . . . 1, 2, 8

47 U.S.C. § 605(a) 8, 9

47 U.S.C. § 605(d)(6) 9

OTHER MATERIALS

Restatement (Second) of Judgments (1982) 5

NSS argues that certiorari should be denied on both the collateral-estoppel issue and the Section 605 standing issue. The reasons to which NSS points, however, are unpersuasive.

I. REVIEW IS REQUIRED IN CONNECTION WITH THE COLLATERAL-ESTOPPEL ISSUE.

A. NSS argues that, even ignoring the "necessary to the judgment" prerequisite (as to which there is a split in the circuits), other prerequisites for collateral estoppel are not met here. In particular, NSS argues that the Section 605 standing issue was not raised in the prior *Coach's Corner* proceedings, *see* Br. in Opp. 10-11, that there accordingly was no identity between the issues there and those here, *see id.* at 11-12, and that the standing issue thus was not "actually litigated," *see id.* at 12-13. The easy answer is that, as NSS concedes (*see id.* at 12 n.2, 14 n.3), the court of appeals held otherwise. *See* Pet. App. 8a, 10a-11a, 14a-15a. That is the end of the matter. At most, NSS's arguments could point to alternative grounds for affirmance, which this Court does not ordinarily address.[1] Thus, even if such grounds existed, that would make this case no less certworthy.

Besides, NSS is wrong. Each of NSS's contentions turns on the premise that Time Warner made no argument before the *Coach's Corner* court that NSS would lack standing even if the contract there had not expressly precluded NSS from bringing suit. That premise is mistaken. *See id.* at 8a ("In its motion before the court in *Coach's Corner*, Time Warner argued that it was entitled to summary judgment because NSS was not a 'person aggrieved' within the meaning of § 605(d)(6), and could therefore not pursue a claim for an alleged violation of § 605(a)."). Indeed, NSS's own brief in *Coach's Corner* responded to the point by arguing that "[p]laintiff is clearly within the zone of interests to be

---

[1] *See, e.g., TRW Inc. v. Andrews*, 122 S. Ct. 441, 450-51 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996).

protected by 47 U.S.C. §605 as it is an aggrieved party." Plaintiff's Memorandum in Opposition at 15, *National Satellite Sports, Inc. v. Lynstalder, Inc.*, Case No. 5:97CV2039 (N.D. Ohio filed July 1, 1998); *see also* Time Warner's Reply Memorandum at 6, *National Satellite Sports, Inc. v. Lynstalder, Inc.*, Case No. 5:97CV2039 (N.D. Ohio filed July 9, 1998) ("[B]ecause Coach's Corner did not receive the signal carrying the Event via [NSS's transmission] . . . , plaintiff is not a 'person aggrieved' under § 605, and does not have standing to sustain this action against [Time Warner].").[2]

It is equally plain that the *Coach's Corner* court squarely decided the Section 605 standing issue. As the court explained:

> [T]he statute defines a person aggrieved as a person who is entitled to file suit for a violation under 47 U.S. Code Section 605(a), which includes any person with propriet[ar]y rights in the intercepted communication.

---

[2] Moreover, contrary to its assertions in the Brief in Opposition, NSS extensively addressed the standing issue at oral argument in *Coach's Corner* (Tr. 22-23):

> In light of the definition contained in the statute for a person aggrieved, "any person aggrieved," which includes any person with proprietary rights in an intercepted communication, including wholesale or retail distributors of satellite cable programming, etcetera, etcetera, I would argue that it's clear that the plaintiff is an aggrieved person, party, and that it does in fact have standing to sue under the standards enunciated by the United States Supreme Court in [*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)].
>
> And in support of that, I would also cite the Court to [*Joe Hand Promotions, Inc. v. Rennard Street Enterprises, Inc.*, 975 F. Supp. 746 (E.D. Pa. 1997)], which appears in our memorandum in opposition on pages 6 through 10.
>
> Interestingly, your Honor, that case involved the question of whether or not Joe Hand Promotions had standing to sue for an HBO boxing match. And that Court in fact found that Joe Hand Promotions did in fact have standing because it was an aggrieved party to sue for a violation of 605.

> In this case, I don't think there is any dispute that the communication at issue was the [network feed intended for cable operators] and not the closed circuit television feed which was what Joe Hand and then subsequently National Satellite had an interest in.
>
> And based upon that, those undisputed facts, plaintiff has failed to state a Section 605 claim as an aggrieved person.

Pet. App. 66a. By its terms, that holding had nothing to do with the contract clause precluding NSS from bringing suit; it was squarely based on NSS's status as a stranger to the signal that found its way to Coach's Corner.

B. Next, NSS argues that the Sixth Circuit's collateral-estoppel holding was correct, and that certiorari should be denied for that reason. *See* Br. in Opp. 14-18. The short answer is that NSS will have plenty of opportunity to make that argument in its brief on the merits; by itself, NSS's argument, even if it were correct, would not constitute a reason to deny review. The fact remains that there is a clear split in the circuits, which needs to be resolved.

Besides, NSS's argument that preclusion would "promot[e] frivolous and unnecessary appeals in cases where a party recognizes that one independent ground for a trial court decision is correct" (*id.* at 15) misses the point. It may be that, when one of two alternative holdings is iron-clad, an appeal on the other issue is practically foreclosed. But any harshness to the losing litigant that may result from granting preclusion in such circumstances is vastly outweighed by the inequity to the litigant having won on not one but two grounds if preclusion is denied. That is particularly so because the losing litigant could easily have avoided its predicament by declining to litigate the case to judgment in the face of an insurmountable obstacle blocking its position. *See* Pet. 16 n.9. For example, if (as NSS implies) the contractual bar in *Coach's Corner* was unassailable on appeal, it was just as

unassailable in the trial court. When NSS nevertheless brought suit, it assumed any risk of forfeiting an appeal on other grounds.

Perhaps there are rare instances in which the iron-clad nature of an alternative ground could not be anticipated in advance — for example, where a trial court resolves a close factual question in a way that is entitled to deference on appeal. But if an alternative holding in that scenario presents special equities, the consequence should not be to throw out the baby with the bath water by denying preclusive effect to *all* alternative holdings. There is sufficient flexibility within the doctrine of collateral estoppel to accommodate such cases on an individual basis.[3] Any exception for such cases would be inapplicable here, however, for NSS does not argue that the unappealable nature of the contractual holding in *Coach's Corner* (which it implies would have made an appeal frivolous) came as a surprise.[4]

NSS's assertion that this case illustrates how "alternative holdings do not necessarily reflect . . . thoughtful consideration" (at 16-18) is equally meritless. NSS's suggestion that the *Coach's Corner* court rendered its Section 605 holding without prior briefing or argument on that point is simply wrong. *See supra*, pp. 1-3. And any suggestion that the alternative holdings of courts of first instance are less thoroughly considered than those of appellate courts is nothing short of offensive to the dedication and ability of the Nation's

---

[3] *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-34 (1979) (collateral estoppel may be denied where it would work injustice under the circumstances of the case).

[4] Nor can NSS come within the exception recognized in *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 527 N.E.2d 754, 757 (N.Y. 1988), a case to which the Brief in Opposition points at page 16. In *Staatsburg*, the prior decision occurred in an administrative inquiry that an agency had initiated sua sponte, and that the "losing" litigant therefore could not have avoided.

trial judges. *See* Pet. 17. NSS has no answer to this basic point.

C. NSS does not deny that a circuit split exists, but tries to minimize it by claiming that the anti-preclusion side of the conflict overshadows the pro-preclusion side. Even if that were true, it would of course not diminish the basic fact of the circuit split's existence. Besides, it is not true; NSS's attempt to minimize the conflicting case law (which it characterizes as "dicta" and "outdated") is unconvincing.

As for the Ninth Circuit, NSS does not deny that the court authoritatively held in *In re Westgate-California Corp.*, 642 F.2d 1174 (9th Cir. 1981), that, "[e]ven though the court rests its judgment alternatively upon two or more grounds, the judgment concludes each adjudicated issue that is necessary to support any of the grounds upon which the judgment is rested." *Id.* at 1176 (internal quotation marks omitted). Although NSS argues that *Westgate* antedated the final version of the *Restatement (Second) of Judgments* (1982),[5] its holding continues to bind future Ninth Circuit panels and could be overruled only en banc.[6] And there is no reason to believe that this will happen. To the contrary, the Ninth Circuit followed *Westgate*'s holding *after* the issuance of the *Restatement (Second)*'s final version. *See Bank of Guam v. Wiseman*, No. 87-1799, 1990 WL 140521, at *2 (9th Cir. Sept. 27, 1990) (judgment noted at 914 F.2d 1496 (table)).

NSS is also wrong in suggesting that the D.C. Circuit formulated its position as mere *dictum* in *Yamaha Corp. of America v. United States*, 961 F.2d 245, 255 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1078 (1993). At issue in

---

[5] *Westgate* postdated earlier versions of the *Restatement (Second)* that took the same position as the final version and that were found persuasive by other courts. *See, e.g., Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1167 n.4 (5th Cir. Unit A Dec. 1981).

[6] *See, e.g., Spinelli v. Gaughan*, 12 F.3d 853, 855 n.1 (9th Cir. 1993).

Yamaha was the preclusive effect of an alternative ground in the decision of a federal district court in California, to which the D.C. district court had given preclusive effect. *See id.* at 250, 252. On appeal, Yamaha made two arguments: (1) that the D.C. district court should not have given preclusive effect to an alternative holding; and (2) that, after the D.C. district court issued its decision, the Ninth Circuit had affirmed the California district court's decision on only one ground, thereby retroactively depriving the other of preclusive effect. *See id.* at 255, 257.[7] The D.C. Circuit rejected each, holding (1) that alternative holdings in district court decisions are each entitled to preclusive effect, *see id.* at 255; and (2) that the Ninth Circuit had not expressly limited its affirmance to only one ground, so that the preclusive effect of the California district court's decision had not been eliminated, *see id.* at 255-56. Contrary to NSS's suggestion, the D.C. Circuit never addressed whether the Ninth Circuit's judgment itself was entitled to preclusive effect (which perhaps could have been viewed as an alternative ground for affirmance). Thus, both of its holdings were necessary to the D.C. Circuit's judgment, and neither was *dictum*.[8]

NSS is similarly mistaken in suggesting that the Second Circuit has repudiated Judge Learned Hand's classic pronouncement in *Irving National Bank v. Law*, 10 F.2d 721 (2d Cir. 1926). In its 1986 *Gelb* decision, the Second Circuit reaffirmed *Irving* by citing it for the proposition that "[t]he

---

[7] *See, e.g., Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986) ("[I]f an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground."), *cert. denied*, 480 U.S. 948 (1987).

[8] *See, e.g., Kalka v. Hawk*, 215 F.3d 90, 95-96 (D.C. Cir. 2000) ("The fact that the case theoretically could have been decided without deciding the . . . question is of no moment. A court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis.") (internal quotation marks omitted).

general rule in this Circuit is that 'if a court decides a case on two grounds, each is a good estoppel.'" 798 F.2d at 45 (quoting 10 F.2d at 724); *see also Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 733 (2d Cir. 1979). NSS's reliance on *Halpern v. Schwartz*, 426 F.2d 102 (2d Cir. 1970), is misplaced. That decision, which declined to apply preclusion, was later "limited" to the "special circumstances" (involving complex bankruptcy issues) there present. *Gelb*, 798 F.2d at 45 n.6; *see also Winters v. Lavine*, 574 F.2d 46, 67 (2d Cir. 1978) ("[T]he [*Irving*] rule has continuing viability in circumstances divergent from those in *Halpern*."); *Williams v. Ward*, 556 F.2d 1143, 1154 (2d Cir.) (Friendly, J.) ("*Halpern* . . . is not to the contrary" because it was "limited to the facts before us") (internal quotation marks omitted), *cert. dismissed*, 434 U.S. 944 (1977).

Finally, NSS's suggestion (at 21) that the Sixth Circuit did not chart a third course flies in the face of the plain language of the court of appeals' opinion. *See* Pet. App. 13a ("We do hold . . . that where, as in *Coach's Corner*, one ground for the decision is clearly primary and the other only secondary, the secondary ground is not 'necessary to the outcome' for the purposes of issue preclusion."). Nor can NSS persuasively liken the Sixth Circuit's rule to one under which *dicta* are disregarded. *See* Br. in Opp. 21 n.9. If the Sixth Circuit could legitimately have equated "secondary" holdings with *dicta*, it could have side-stepped the entire circuit split. *See* Pet. 16 n.8. The Sixth Circuit's decision plainly contemplates that there is an amorphous set of decisional grounds that constitute neither *dicta* nor "primary holdings," and that these grounds are not entitled to preclusive effect.

II. REVIEW IS REQUIRED IN CONNECTION WITH THE SECTION 605 STANDING ISSUE.

NSS does not dispute that the Section 605 standing issue is sufficiently important to warrant this Court's attention, a proposition that is further cemented by NCTA's brief *amicus curiae*.[9] Nor does NSS deny that granting certiorari on this second issue could assist the Court in resolving the issue-preclusion question discussed above. *See* Pet. 19 n.11. Instead, NSS's opposition is devoted to the merits: it contends that NSS does have standing to enforce the first sentence of Section 605(a). But that contention — more relevant at the merits stage than here — misapprehends Time Warner's claim and misstates the relevant law.

NSS first seeks advantage from the 1988 amendment providing that "the term 'any person aggrieved' shall include" certain persons whose standing was questionable under then-prevailing case law. *See* Br. in Opp. 24. According to NSS, the amendment's intent to broaden standing, together with the term "include," add up to the conclusion that NSS (and apparently anyone else) should be accorded standing. But, as explained in the Petition, courts have always subjected "person

---

[9] NSS does argue that the court of appeals' view is not entirely unprecedented, in that a few district courts have "found that plaintiffs with similar claims have standing." Br. in Opp. 26; *see id.* at 27-29. But none of the four district court decisions on which NSS relies supports its position. *Television Signal Corp. v. Chapman*, No. C92-3732, 1993 WL 69179 (N.D. Cal. Mar. 3, 1993), involved a suit by a cable operator against a bar for unlawfully intercepting its cable service — a claim that would also come within petitioner's conception of standing. Similarly, *Joe Hand Promotions, Inc. v. Rennard Street Enterprises, Inc.*, 975 F. Supp. 746 (E.D. Pa. 1997), involved a suit against interceptors of a satellite signal. *See id.* at 751; *see also Joe Hand Promotions, Inc. v. Rennard Street Enters., Inc.*, 954 F. Supp. 1046, 1054-55 (E.D. Pa. 1997). The remaining decisions on which NSS relies did not address standing at all, and are therefore inapposite. *See That's Entertainment, Inc. v. J.P.T., Inc.*, 843 F. Supp. 995 (D. Md. 1993); *Joe Hand Promotions v. D.M.B. Ventures, Inc.*, Nos. CIV. A. 93-2656 & 93-3141, 1995 WL 328399 (E.D. La. May 31, 1995).

aggrieved" statutes to a zone-of-interests limitation. *See* Pet. 21-23. Even if a plaintiff that does not fall within the categories of the "include" clause can have standing, it simply does not logically follow that such a plaintiff automatically satisfies the zone-of-interests limitation. *See* Pet. 25.

NSS (at 24-25) next attributes to the Petition a strawman: that a plaintiff must come within the "include" clause to have standing. In fact, the Petition argues that, even if this is not required, a plaintiff must still satisfy the zone-of-interests test. *See* Pet. 25. NSS also suggests (at 25) that it *can* come within the terms of the "include" clause. But that clause grants standing only where there is an "intercept[ion]." 47 U.S.C. § 605(d)(6). Even assuming that Time Warner was not authorized to provide the programming at issue to the Melody Lane Lounge, there was no interception: Time Warner was in lawful possession of the signal.

Finally, NSS suggests that it does fall within the zone of interests protected by the first sentence of Section 605(a) — on the theory that it "is not a stranger that had only some indirect economic interest," but had an interest in "the content of the boxing event" that was of "significant economic value." Br. in Opp. 25 (internal quotation marks omitted). But the first sentence of Section 605(a) was intended to protect the privacy and integrity of electronic communications — not to shield intellectual-property interests left unprotected by other measures. To have standing, then, a plaintiff must have been injured in some justified expectation of communicative privacy or integrity of its own. NSS therefore cannot predicate standing upon a supposed infringement of its economic interests as a programming licensee — no more than either of the boxers involved in the bout depicted (or, for that matter, their employees or creditors) could make such a claim. Like them, NSS may have suffered injury in fact, but that by itself

is simply not enough to bring NSS within the zone of interests protected by the statute.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD W. CLARY
GARY A. BORNSTEIN
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

MARC APFELBAUM
JEFFREY M. ZIMMERMAN
CRAIG A. GOLDBERG
TIME WARNER CABLE
290 Harbor Drive
Stamford, CT 06902
(203) 328-0600

HENK BRANDS
Counsel of Record
COLIN S. STRETCH
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

PAUL T. CAPPUCCIO
EDWARD J. WEISS
AOL TIME WARNER INC.
75 Rockefeller Plaza
New York, NY 10019
(212) 484-8000

Counsel for Petitioner

January 23, 2002

---

[10] NSS also says that Time Warner "apparently disagrees . . . with the fact finding of the courts below that the signals NSS and [Time Warner] received in their respective Ohio facilities both originated from the same initial transmission of the communication." Br. in Opp. 27. Although the residential and the commercial signals originated from a single set of cameras at ringside, the signals diverged at a later point. *See* Pet. App. 3a. NSS does not argue otherwise.